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No. _____

In The Supreme Court
of the
United States

October Term, 1982

VOLVO PENTA OF AMERICA
Petitioner

vs.

PATRICK H. KENNEDY
Respondent

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Counsel for Respondent
Patrick H. Kennedy

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R.C.W. 4.28.080

COUNTER STATEMENT OF THE CASE

On September 16, 1978, Patrick H. Kennedy purchased a 1979 28-foot Hawaiian boat. (CP 20-21). The retail dealer which formerly did business in Kennewick, Washington was Sundown Marine, Inc. The manufacturer of the boat which formerly did business was Hawaiian Boats, Inc., located in Huntington Beach, California. Volvo Penta of America, Chesapeake, Virginia, manufactured the engine. (CP 6-27).

The boat was defective upon delivery, and had significant engine problems. Mr. Kennedy rescinded his contract of purchase. (CP 6-27).

The only information provided with the product, concerning the location of the manufacturer of the engine was issued by "Volvo Penta" with the address as follows:

VOLVO PENTA OF AMERICA
Attn: Service Department
P.O. Box 1546
Chesapeake, Virginia 23320

(CP 6-27).

Contained with the boat was an instruction book for the "Volvo Penta" which was published in Sweden. No where in the documentation provided did it indicate that Volvo Penta of America is a division of another corporation, or that it had an office someplace else in the United States, other than Chesapeake, Virginia. (CP 6-27).

On May 25, 1979 , a formal notice of rescission was given to the three companies listed above by certified mail, return receipt requested. This notice stated that Mr. Kennedy had a claim for breach of warranty, and that he would bring an action if an out of court settlement could not be reached. (CP 6-27). This notice was mailed to Volvo Penta at its address in Chesapeake, Virginia. A signed return receipt was received showing that Volvo Penta received this letter on June 4, 1979. (CP 6-27). Volvo Penta did not respond to Mr. Kennedy's notice.

Mr. Kennedy instituted an action for breach of warranty under the Uniform Commercial Code in the State of Washington, and the Magnusson Moss Act (15 USC S2301 et seq). (CP 20-21). The sheriff of Chesapeake, Virginia, served a Summons and Complaint upon Volvo Penta of America at 4:oo p.m., on July 3, 1979. This was an ordinary working day, and the sheriff served Mr. Michael Machupa because he was the highest authority at the plant when the process was served. (CP 12). It is nowhere denied that Mr. Machupa was "in charge of his division and was the highest authority at the plant." (CP 6-27).

The sheriff indicated that before Mr. Machupa accepted service he made a long distance call to Volvo's New Jersey offices and that Mr. Machupa received express authority to accept the service. (CP 6-27). This fact is undenied and undisputed.

After entry of the default judgment, plaintiff's counsel, used exactly the same address, and mailed, first class mail, a letter dated September 17, 1979 enclosing a copy of the default judgment. Thereafter, Volvo moved to vacate the default judgment.

ARGUMENT

1. *Constitutional Sufficiency of Service:*
The State of Washington, like almost all other sister states, has enacted legislation that provides the method and manner of service of process upon a corporation. In 19 AmJur 2d *Corporations* S1462 the author states as follows:

> "While undoubtedly the State may prescribe special regulations governing service of process on corporations, it must, in fixing such regulations, act with due regard to the constitutional guaranty against deprivation of property without due process of law. The method prescribed for the service of process on a corporation, in order to confer jurisdiction, must constitute due process of law under the requirements of the Federal Constitution. If, however, the mode or method which has been provided does not deprive the corporation of its property without due process of law, the enactment is not subject to attack. The fundamental object of all laws relating to the service of process is to give that notice which will in the nature of things most likely bring the attention of the corporation to the commencement of the proceedings against it, and when the Legislature carries out this design, its provisions should not be stricken down by the courts."

The Legislature in the State of Washington has Passed a specific statute regulating the service of process upon foreign corporations doing business with sufficient minimum contacts for jurisdictional purposes in the State of Washington. In RCW 4.28.080 (10) the Legislature has provided in pertinent part as follows:

> "The Summons shall be served by delivering a copy thereof as follows:

...

(10) If the suit be against a foreign corporation...to *any agent*...thereof."

It is within the power of the state to determine what corporate officer or agent shall be served, provided that the constitutional guarantees of due process of law are observed. 19 AmJur 2d *Corporations* S1463. *Eureka Lake & Y Canal Co. vs. Superior Ct.*, 116 U.S. 410, 29 L.ed 671, 6 S.Ct. 429.

The tendency of legislative and judicial decisions has been to attempt to make it easier to obtain jurisdiction over foreign corporations. *International Shoe Company vs. Superior Court*, 22 Wn 2d 146, 171, 154 P2d 801 (1945). *See, also, Beach vs. Kerr Turbine Company*, 243 Fed. 706.

The courts have liberally construed the statutory term "any agent." *Faucher vs. Burlington Northern, Inc.* 24 Wn App.711, 603 P2d 844 (1979).

It is undisputed that there was no information with the product to indicate that Volvo Penta of America was a division of Volvo of America. After the suit was commenced, and service of process completed at the only address given to consumers, Volvo of America now claims that Volvo Penta of America is a "division" and that the consumer should have known that corporate offices were elsewhere. How? It is undisputed that the only information provided indicates that the company is located in Chesapeake, Virginia; that warranty complaints are to be addressed to Chesapeake, Virginia, and as far as any consumer would be aware the only other geographical location of Volvo Penta of America is in the Country of Sweden where the instruction book for the engine was printed.

The petitioner in this case takes the ludicrous position that service of process upon the highest corporate official at the only address for complaints, during ordinary business hours, is insufficient for in personam jurisdiction under the due process clause of the United States Constitution. The position of the petitioner simply has no merit.

The opinion of the prior cases in the State of Washington have been consistent since 1893 when interpreting the statute to provide that an individual such as Mr. Machupa who was in charge of his division would be a sufficient "agent" for service of process.

In *Gram vs. Idaho National Harvester Co.*, 105 Wn 602, 178 P 815 (1919) a similar challenge was made to service of process, and the Supreme Court affirmed that the process was valid. In *Grams* the Supreme Court described the duties of the individual upon whom service was had as follows:

> "M.C. Priddy testified that, on the day the summons was served on him, he was in Adams County for the purpose of checking and handling a stock of extras or repair parts of the machine on hand with the union elevator and warehouse company at Ralston, having been sent by the manager of appellant to do this particular work. He held no official position with appellant. He worked by the month for a salary and had no regular kind or class of work, but did different work and performed different duties as the manager of appellant instructed, assigned, or directed him to do."

The State (RCW 4.28.080, et seq.) has remained unchanged in any material part, since 1893. The Supreme Court in *Grams* stated as follows:

> "We think that there can be no question that M.C. Priddy at the time of the service of the Summons and Complaint upon him, was 'an agent' of the appellant, within the contemplation of the statute. For some time he had been, and was still, employed to do whatever he was directed to do by the General Manager of the Company; at the time in question, under instructions of the company, he was in Adams County to check up and take over all of the property of the appellant remaining in the hands of Union Elevator and

Warehouse Company. While there, he rendered that service, and gave the merchant a receipt for the goods, took the goods and shipped them to his principal, the appellant. This court in the case of *Barrett Manufacturing Co., vs. Kennedy*, 73 Wn 503, 131, P 1161, after enumerating a number of cases from this and other courts upon this subject, further refers to some of them and concludes as follows:

"In the *Jenkins* case (73 S.C. 526, 53 S.E. 991), a service of Summons upon a time keeper of the defendant, a foreign corporation was held sufficient. The court said that the legality of the service did not depend upon the tenure of the service, but 'upon the character or nature of the service,' and that 'agency may also be shown by the fact that a person represents the master in some, one or more of his relations to others, even though he may not have the power to contract.' The statute makes service upon 'any agent' of a foreign corporation sufficient. The statute therefore, does not require that the agent shall be general, but is complied with by a service upon an agent having limited authority to represent his principal.' In the *Cottrell* case (83 B.A. 512, 3 S.E. 123), the court defined the term 'agent' as signifying 'anyone who undertakes to transact some business affair for another by authority and on account of the latter, and to render an account of it.'

> In the *Moinet* case (143 Mich. 489, 106 NW 1126) it was held that at traveling salesman of a domestic merchantile company is an agent within the meaning of the statute permitting service 'upon the agent' of a corporation. The words of the statute 'any agent' were intended to have a broad meaning, and must be liberally construed to effectuate the legislative intent. While they may not include a day laborer or an employee who has no authority to represent the corporation in any way other than to discharge his daily task, they must be held to include all such agents as represent the corporation in either a general or a limited capacity."

The respondent would suggest that an unknowing consumer certainly should be permitted within the confines of the existing law to commence an action by serving an individual that is in charge of a division of a corporation, particularly since service of process was not attempted on a night watchman, or when the company was not actually doing business, but service was made on the highest individual in charge at the only address given for complaints, during ordinary business hours.

In *Brace vs. Northern Pacific Railroad Co.*, 63 Wash. 417, 115 P 841 (1911) the court stated as follows:

> "Corporations necessarily act through authorized agents. Departments are created in charge of superintendents, with many subordinates through whom the corporation conducts its business and deals with the public. The more extensive the greater number of agents.

> If each and every individual having business with such corporation must at his peril ascertain and determine that exact scope and limitation of the agent's authority, it is manifest that he could not deal with the acknowledged agent and that the business of the corporation itself would be materially impaired."

It is also undisputed and undenied, that Mr. Machupa had express authority from headquarters located elsewhere that he should accept service of the process.

EVIDENTIARY SUPPORT

It is, of course, a broad fundamental principle that the courts presume that public officers such as Sheriffs faithfully discharge their sworn duties. It is not necessary pursuant to the Statutes of the State of Washington that the Sheriff's Return of Service be by affidavit. The Sheriff may serve the documents, and so certify by a "return" or endorse or attach the same to the summons. RCW 4.28.310 provides as follows:

> "Proof of service shall be as follows:
> (1) If served by the sheriff or his deputy, the return of such sheriff or his deputy endorsed upon or attached to the summons. If by any other person, his affidavit there of endorsed upon or attached to the summons;"

It is well established that a sheriff's return is conclusive as to matters within the knowledge of the sheriff. *Krutz vs. Isaacs,* 25 Wn 566, 66 P. 141 (1901). It is the fact of service that confers jurisdiction on the court, and not the return of service. A return of service may be later amended to speak the truth. *Williams vs. Steamship Mutual Underwriting Assn. Ltd.,* 45 Wn 2d 209, 273 P2d 803 (1954).

In this case the sheriff's return was amended by letter (which need not be notarized by statute) and was accepted by the courts of the State of Washington.

There never has been any accusation that the information provided by the sheriff was false, or that the sheriff did not do exactly as he indicated that he did, and as he was required to do by law. In 62 AmJur 2d, *Process* S28 the author states as follows:

> "It is a broad fundamental principle that a presumption will be indulged in favor of the legality and regularity of the proceedings of the trial court when this may be done consistently with the record; it will be presumed, if the court is a court of general jurisdiction, that it regularly acquired and lawfully exercised its jurisdiction over the party or the res, as the case may be. This is true not only in the reviewing court on appeal or error proceeding, but whenever a judicial proceedings or a judgment or decree rendered therein becomes a factor in the trial of another case. There is a presumption that public officers discharge the duties of their office and in the discharge of such duties observe the necessary and proper formalities imposed by the law upon them, and faithfully perform those matters with which they are charged. (Italics Supplied.)"

The defendants have never denied a single syllable of information supplied by the sheriff who served the papers; in fact, a close reading of the affidavits that were supplied when compared with the information provided by the sheriff, provides undisputed and undenied evidence that compels the conclusion reached by the courts in the State of Washington, i.e., that service was at a proper place, at a proper time, and upon a proper party.

CONCLUSIONS

1. The courts of the State of Washington have reached the only conclusion that can be reached under the facts of this case; that service of process was had upon the individual in charge of a division of a manufacturing company; that service of process was made by a public official at the only address provided for unknowing customers; that service of process was had during regular business hours; that it must be held as a matter of law that such service of process is adequate.
2. That the Sheriff properly fulfilled the sworn duties of his office, and his report to the court through counsel was appropriate.
3. That the court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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